International Union of Operating Engineers, Local Union No. 150, AFL-CIO *and* Tri-City Excavating, Inc. Case 13-CP-394

April 16, 1981

DECISION AND ORDER

Upon a charge filed by Tri-City Excavating, Inc., herein called the Charging Party, the General Counsel for the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint on October 31, 1979,[1] against International Union of Operating Engineers, Local Union No. 150, AFL-CIO, herein called the Respondent. Copies of the charge and the complaint and notice of hearing before an Administrative Law Judge were duly served on the Respondent and the Charging Party. The complaint alleged that the Respondent violated Section 8(b)(7)(C) and Section 2(6) and 2(7) of the Act.

The Respondent duly filed an answer in which it admitted certain allegations of the complaint, but denied that it had engaged in any unfair labor practices.

Thereafter, all parties to the proceeding, the General Counsel, the Charging party, and the Respondent, filed a stipulation of facts and a motion to transfer proceeding to the Board. The parties agreed that the formal papers and the stipulation of facts with attached exhibits constituted the entire record in the case, and that no oral testimony is necessary or desired by any of the parties. The parties further stipulated that they waived a hearing before an administrative law judge, and the issuance of an administrative law judge's decision, and that they desired to submit the case for findings of fact, conclusions of law, and order directly to the Board.

By order dated May 29, 1980, the Board approved the stipulation, made it part of the record, and transferred the proceeding to the Board for the purpose of making findings of fact and conclusions of law, and for the issuance of a Decision and Order. Thereafter, the General Counsel, the Charging Party, and the Respondent filed briefs in support of their positions.

The Board has considered the entire record herein as stipulated by the parties, as well as the briefs filed by the parties, and hereby makes the following:[2]

[1] The complaint was a consolidated complaint covering the instant case and also Case 13-CB-8721. The cases were later severed, Case 13-CB-8721 was withdrawn, and allegations of the consolidated complaint relating to Case 13-CB-8721 were dismissed.

[2] The Respondent and the Charging Party requested an opportunity to present oral argument. The requests are denied as the record and briefs adequately present the positions of the parties.

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

The Charging Party, an Illinois corporation with an office and principal place of business in Batavia, Illinois, is, and has been at all times material to this proceeding, engaged in the business of land excavation for builders in the construction industry. During the past calendar or fiscal year, a representative period, it purchased and received at its Batavia facility goods and materials valued in excess of $50,000 from other enterprises located within the State of Illinois, which had received the goods and materials directly from points outside the State of Illinois.

We find that the Charging Party is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Sections 2(6) and (7) and 8(b) of the Act. We further find that it will effectuate the purposes of the Act to assert jurisdiction in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent, Local 150, International Union of Operating Engineers, AFL-CIO, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Issue*

The issue presented in this case is whether the Respondent, which did not have majority status, violated Section 8(b)(7)(C) by picketing the Charging Party, for more than 30 days without a representation petition having been filed, for the announced purpose of collecting fringe benefit payments, which were allegedly past due under the terms of a contract that had been entered into pursuant to Section 8(f) of the Act.

B. *The Facts*

The Respondent, which represents operators of heavy construction equipment, has never represented a majority of the Charging Party's employees. However, on April 15, 1974, George Key, the Charging Party's president, signed a memorandum of agreement with the Respondent. The memorandum stated that the Employer recognized the union, adopted the master agreement between the union and a bargaining association, and agreed to contribute to its health and welfare and pension trusts.[3]

[3] The body of the memorandum read:

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The Respondent maintains that, by signing this memorandum of agreement, the Charging Party adopted the then-current master collective-bargaining agreement which had been negotiated between the Union and the Mid-American Regional Bargaining Association (MARBA) covering heavy, highway and underground construction work (master agreement). The memorandum of agreement signed on April 15, 1974, is the only purported agreement signed by the Charging Party. The Charging Party never signed a copy of the master agreement; nor is it the practice for the Respondent to ask a party who has signed a memorandum of agreement also to sign a master agreement.

From April 15, 1974, to the present, there have been in effect successive master agreements. The Charging Party never signed copies of these master agreements; nor was it the practice for the Respondent to ask a party who had signed a memorandum of agreement to also sign any subsequent master agreements.

At all times material hereto the Respondent and MARBA have also been parties to successive area agreements covering building construction work (building agreements). The Charging Party has never signed copies of these building agreements. The Charging Party is not a member of any multiemployer association.

Prior to the time the instant dispute arose, the Charging Party never was provided with a copy of any master agreement, nor did the Charging Party ever request that it be provided with a copy.

Since at least April 1974, until May 1979, the Charging Party has made contributions, in amounts specified in the successive master agreements, to health and welfare, pension, apprenticeship, and vacation savings funds (fringe benefit funds) only for George Key and his son, Monte.

From the inception of the Charging Party's corporate existence until 1975, George Key served as president and sole shareholder of the Charging Party. Additionally, during that period of time, George Key performed work of the type described in the master agreements. During that period of time, Monte Key performed estimating, engaged in customer contacts, and also performed work of the type described in the master agreements. In 1975, George Key sold all the shares of the Charging Party to Monte Key. Thereafter, and to date, Monte Key served as president and sole shareholder of the Charging Party. Additionally, Monte Key has performed work of the type described in the master agreements. From 1975 to date, George Key performed work of the type described in the master agreements.

Medical benefits claims were submitted to the welfare fund by George Key or Monte Key, for themselves or their dependents, in 1976, 1977, 1978, and February 1979. In some instances these claims were paid by the welfare fund; in some instances they were denied.

Richard Isbell was employed by the Charging Party in March 1977, and has remained in the Charging Party's employ since that time. At all times material hereto, Isbell has performed work described in the master agreements. At no time material was Isbell a member of the Respondent.

In early June 1979, the Respondent claimed that the Charging Party had improperly failed to make contributions under the terms of the master agreement to the fringe benefit funds on behalf of Richard Isbell.

On June 7, 1979, the Respondent sent a telegram to the Charging Party claiming that the Charging Party was delinquent in its contributions to the fringe benefit funds for the months of April 1978 through April 1979.[4] The Charging Party was informed that pursuant to article XVIII, section 1, of the master agreement,[5] the Respondent would

1. The Employer recognizes the Union as the sole and exclusive bargaining representative for and on behalf of the employees of the Employer within the territorial and occupational jurisdiction of the Union.

2. The Parties do hereby adopt the Agreement dated July 1, 1973 by and between the Union and the Mid-American Regional Bargaining Association and the parties do hereby mutually agree to be bound by the terms and conditions of the Agreement, the Health and Welfare Trust, and the Pension Trust, including the per hour contributions provided therein, and the Trust Agreement creating same.

3. This Agreement and the adoption of the Agreement and Trusts referred to in paragraph 2 above, shall be effective as of April 15, 197 , and remain in effect to and including the expiration date of the Agreement adopted herein. This agreement shall continue in effect from year to year thereafter and specifically adopt any Agreement entered into between the Union and Mid-American Regional Bargaining Assn. subsequent to the expiration date of the Agreement herein adopted unless notice of termination or amendment is given in the manner provided herein.

4. Either Party desiring to amend or terminate this Memorandum of Agreement must notify the other in writing at least three calendar months prior to the expiration of the Agreement adopted therein.

[4] The body of the telegram read:

You are delinquent in contributions to the Midwest Operating Engineers, Welfare, Pension, Apprenticeship and Vacation Funds for the Month of April 1978 through April 1979. In accordance with Article 18, Section 1 of the Local 150 Operating Engineers Heavy and Highway Agreement you are hereby notified that if you fail within 48 hours to pay all contributions due the welfare, pension, apprenticeship and vacation funds, the Union shall resort to all economic remedies, including the right to strike and picket until such delinquent contributions have been paid. You are further advised that pursuant to Article 18, Section 3 of the said agreements, the Union does hereby demand a payment bond guaranteeing all earnings, vacation savings, welfare and pension contributions, which are due or will be due under the terms of the said agreement.

[5] Art. XVIII, sec. 1 of the master agreement, effective July 1, 1978–June 30, 1981, reads:

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resort to all economic remedies, including the right to strike and picket, unless the alleged delinquent contributions were paid within 48 hours.

Thereafter, on or about June 12, 1979, the Respondent picketed the Charging Party at the High Trail Housing Subdivision on Route 53 in Wood Dale, Illinois, and on or about June 25, 1979, picketed at the Butterfield Ridge jobsite, which is adjacent to the Stonehedge Housing Development on Route 56, Milton Township, Illinois. On both occasions the picket signs stated: "Local No. 150, IUOE on strike against Tri-City Excavating for failure to pay fringe benefits."

On or about June 25, 1979, the fringe benefit funds received the Charging Party's contributions for the month of May 1979 including a payment for Isbell for hours worked in May 1979. However, the Respondent continued to contend that additional past fringe benefit fund contributions were due for Isbell.

On or about July 9, 1979, the Respondent picketed the Charging Party at the Stone Hedge Housing Development, Route 56, Milton Township, Illinois, with picket signs which read: "Local No. 150, IUOE on strike against Tri-City Excavating for failure to pay fringe benefits."

On July 17, 1979, counsel for the Charging Party sent a telegram to the Respondent denying that the Charging Party had entered into a valid prehire agreement with the Respondent. Further, the Charging Party stated that it was disavowing and repudiating any such alleged agreement. On July 18, 1979, counsel for the Charging Party sent the Respondent a letter, identical in content to the telegram.

On August 1, 2, and 3, 1979, the Respondent again picketed the Charging Party at the Stone Hedge Housing Development on Route 56, Milton Township, Illinois, with picket signs which stated: "Local No. 150, IUOE on strike against Tri-City Excavating for failure to pay fringe benefits."

At no time has the Respondent or any other party filed a petition to be certified as the collective-bargaining representative of the Charging Party's employees pursuant to Section 9(c) of the Act.

The Charging Party filed a petition in Case 13-RM-1291 on October 4, 1979, seeking to determine whether the Respondent represented a majority of its employees. A hearing was held in the case on November 28 and 30, 1979, and on November 30, 1979, the Respondent disclaimed interest in representing the Charging Party's employees.

According to the stipulation of the parties, the following testimony concerning the operation of the welfare fund and pension fund would be given by Larry W. Bushmaker, administrator of the funds, if he were called to testify:

The welfare fund and pension fund are established pursuant to Section 302 of the Taft-Hartley Act, and provide pension and health insurance benefits for eligible participants.

Contributions to the pension fund and welfare fund are made by employers who have signed an agreeement with either Local 150 or Local 537 of the International Union of Operating Engineers providing for payment of contributions to the funds. Employers are required to make contributions to the funds for each employee performing duties within the scope of work provisions of their agreements with the Unions. These contributions are based on the number of hours an employee performs such work, and rates of contribution are specified in the agreements. The funds require that contribution reports and payments be submitted every month by contributing employers.

To be eligible for health insurance benefits in a 3-month period, a participant must have worked 240 hours in a preceding 3-month period.

It is the practice of the fund for purposes of establishing eligibility for welfare benefits to define the term "hours" as hours spent performing bargaining unit work while employed by an employer who has signed an agreement providing for the payment of contributions to the welfare fund. If an employee has worked the requisite number of hours, it is the practice of the fund to determine that the employer is eligible to receive benefits regardless of whether his employer had made contributions on his behalf. It is also the practice of the fund to allow an employee to establish eligibility for health and welfare insurance benefits by producing paycheck stubs or other sufficient proof showing that he performed the requisite amount of bargaining unit work for an employer who is signed to an agreement providing for contributions to the welfare fund. When an employee attempts to establish eligibility for health and welfare benefits on the basis of check stubs, the welfare fund will check to see if the employer has signed an agreement providing for contributions to the welfare fund.

A participant is likewise entitled to receive pension credits for vesting and benefit accrual purposes for hours spent performing bargaining unit

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PENALTY FOR FAILURE TO PAY PENSION AND/OR HEALTH AND WELFARE AND/OR VACATION CONTRIBUTIONS: If any Employer upon forty-eight (48) hours' written notice of default to the Employer fails to pay pension or health and welfare or vacation contributions, the arbitration procedure herein provided for shall become inoperative and the Union shall be entitled to resort to all legal and economic remedies, including the right to strike and picket until such failure to pay has been corrected.

work for an employer who has signed an agreement with the Unions providing for the payment of such contributions, even if the employer has not actually made contributions on behalf of the employee.

The Administrator of the funds has instructed union personnel and the attorneys and accountants who represent the Unions to forward to the funds any letters received from employers which purport to terminate collective-bargaining agreements. Copies of such letters are kept in the employer's file maintained at the fund office.

No individual employed by the Charging Party other than George Key and Monte Key and their dependents have made claims upon, or been paid benefits by, the funds.

C. *Contentions of the Parties*

The General Counsel and the Charging Party contend that by picketing various jobsites of the Charging Party at times during June, July, and August, 1979, the Respondent violated Section 8(b)(7)(C) of the Act. They take the position that this case is controlled by the Supreme Court decision in *N.L.R.B.* v. *Local Union No. 103, International Association of Bridge, Structural & Ornamental Ironworkers, AFL-CIO* [*Higdon Contracting Co.*], 434 U.S. 335 (1978), and that the *Higdon* decision compels the conclusion that the Respondent's picketing constituted recognitional picketing subject to the limitations of Section 8(b)(7)(C). As the Respondent never represented a majority of the Charging Party's employees, they argue, the Respondent could not rely upon any contract with the Charging Party, though privileged by Section 8(f), to show that it had already received recognition and was not picketing for initial recognition restricted by Section 8(b)(7)(C).

The Respondent contends, to the contrary, that its picketing did not have a recognitional object, that an 8(f) contract is effective until terminated regardless of whether the labor organization has attained majority status, and that the *Higdon* decision is not applicable to the facts of this case. The Respondent further urges the Board to establish reasonable requirements for terminating an 8(f) agreement and to reconsider the policies it followed in the *Higdon* case[6] and in *R. J. Smith Construction Co., Inc.*, 191 NLRB 693 (1971).

D. *Discussion*

The complaint in this case and the parties' contentions outlined above present questions as to the effectiveness of a contract entered into under the protection of Section 8(f)[7] where the contracting labor organization never attained majority status, and questions as to the interaction of Section 8(f), 8(a)(5), and 8(b)(7). As pointed out by the parties, these general problems were considered by the Court in *Higdon*.

The complaint alleges a violation of Section 8(b)(7)(C) which proscribes picketing for an organizational or recognitional object when no representation petition is filed within a reasonable period of time, not to exceed 30 days.[8] The parties have

[6] *Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Higdon Contracting Company, Inc.)*, 216 NLRB 45 (1975).

[7] Sec. 8(f) reads:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).*

*Section 8(f) is inserted in the Act by subsec. (a) of Sec. 705 of Public Law 86-257. Sec. 705(b) provides:

Nothing contained in the amendment made by subsection (a) shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

[8] Sec. 8(b)(7)(C) provides that:

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

* * * * *

(c) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be

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stipulated that the Respondent did engage in picketing—conduct governed by Section 8(b)(7)(C)—and that the picketing extended—contrary to the limitations of Section 8(b)(7)(C)— beyond 30 days without a petition being filed. Since the conduct and the time elements of an 8(b)(7)(C) violation are admittedly present, the critical element to be determined in the case is the object of the picketing. If an object of the Respondent's picketing was to require the Charging Party to recognize and bargain or to require the employees to select the Respondent as representative, then the picketing would contravene Section 8(b)(7)(C).

To determine whether an object of the picketing was recognitional, we examine the total factual picture. It appears from the stipulation that the disagreement between the Respondent and the Charging Party which led to the picketing arose in early June 1979. At that time the Respondent claimed that the Charging Party had improperly failed to make fringe benefit contributions on behalf of employee Isbell that were due under the terms of the master agreement that resulted from the 1974 memorandum entered into under the protection of Section 8(f). When the Respondent put its complaint into writing in a telegram on June 7, it described the Charging Party as "delinquent in contributions . . . for the Month of April 1978 through April 1979." Then, when it began picketing about June 12, the Respondent characterized its protest on the picket signs with the statement: "on strike against Tri-City Excavating for failure to pay fringe benefits." Later when fringe benefit contributions were received for the month of May 1979 and included payments in behalf of Isbell for that month, the Respondent persisted in its claim that past contributions were due for Isbell and engaged in further picketing with the same message on the signs.

From the Respondent's conduct set out above it seems clear that the purpose of the picketing was to pressure the Charging Party to make fringe benefit contributions on behalf of Isbell for the preceding year, April 1978–79. So far as the facts submitted show, this was the sole purpose of the picketing. We see nothing to indicate that an object of the picketing was to secure recognition of the Respondent as current bargaining representative or to require current application of the recognition provision or other terms of the 8(f) agreement previously entered into. The Charging Party could have satisfied the Respondent's demands and achieved removal of the pickets by making the allegedly delinquent contributions and without granting recognition to the Respondent or continuing to apply the terms of any 8(f) contract. Therefore, we find that the object of the picketing was not recognitional and the picketing was not subject to the limitations of Section 8(b)(7)(C).[9]

Our determination that picketing to require payment of alleged past obligations is not for a recognitional object within the restrictions of Section 8(b)(7)(C) is consistent with the purposes of that section. It was designed to ensure employees the uncoerced selection of a bargaining representative and to provide machinery for resolving problems resulting from recognitional and organizational disputes. Imposition of 8(b)(7)(C) restraints on the picketing in this case would not deter the establishment of a collective-bargaining representative by means of picketing, because representation was not the condition for ending the picketing. Nor would application of election machinery resolve the dispute about overdue payments, because resolution was not dependent upon whether the Respondent currently represented a majority of the employees.

Our decision is also consistent with the concept that relationships protected by Section 8(f) must be voluntary. The Respondent's picketing was limited to requiring the Charging Party to meet obligations which allegedly had accrued under an 8(f) contract and was not directed at forcing continuation of the 8(f) relationship. We note, moreover, that the alleged delinquencies arose during April 1978–79, a period before the Charging Party expressly repudiated any contract with the Respondent and during which it appeared to be voluntarily observing the contract by making contributions for some employees and making claims for medical benefits from the Funds.

Finally, in view of the particular facts of this case, we conclude that our decision does not conflict with the *Higdon* decision. The *Higdon* case presented a different factual situation and involved picketing for a different purpose. In *Higdon*, a labor organization which had not attained majority status under an 8(f) contract picketed to require the contracting employer to apply the contract to its nonunion operations. Satisfaction of the picketing de-

appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

[9] In view of this finding we do not pass upon other arguments urged by the Respondent.

mands there would have required current application of the 8(f) contract, including recognition of the labor organization as bargaining representative. In these circumstances the Board found the picketing was for initial recognition because the employer had no 8(a)(5) obligation, under the Board's decision in *R. J. Smith*, to continue in effect an 8(f) contract when the contracting union had not achieved majority support. The Court accepted the Board's finding that the picketing was recognitional in purpose. The *Higdon* decision must be interpreted in light of the factual situation the Court was considering, and we do not understand the decision to be as far-reaching as the General Counsel and the Charging Party urge. The Court's statement that "Picketing to enforce the Sec. 8(f) contract was the legal equivalent of picketing to require recognition as the exclusive agent" must be read in connection with the fact that the "enforcement" there sought by picketing was current application of the 8(f) contract. Unlike that situation, the "enforcement" sought by the Respondent's picketing was payment of an alleged past obligation under the 8(f) contract and did not require current application of the contract.

Accordingly, we find that the Respondent's picketing was not for a recognitional object and the Respondent did not violate Section 8(b)(7)(C). We dismiss the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.